Supreme Court, U.S.
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No. 77-1065

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1065

ANNA ERNA LAWRIW, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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The Petitioner, Anna Erna Lawriw, prays the United States Supreme Court to issue an Order granting her a rehearing of her Petition for a Writ of Certiorari, denied by this Court on April 17, 1978, on the grounds as set forth herein.

GROUNDS FOR GRANTING PETITION FOR REHEARING

Petitioner's Petition for a Writ of Certiorari

was filed with the Court on January 30, 1978. Thereafter, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued a preliminary draft of proposed amendments to the Federal Rules of Criminal Procedure. Proposed Rule 44(c), a copy of which, along with the Advisory Committee Note, is attached as Appendix A, deals directly with the issue in the instant case, i.e., conflict of interest in joint representation.

Petitioner maintains that the proposed Rule is an intervening circumstance, and that the policies expressed by the Rule are of substantial or controlling effect. For instance, the trial court is required to "promptly inquire with respect to such joint representation and shall personally advise each Defendant of his right to effective assistance of counsel, including separate representation." This, Petitioner asserts, was not done in the trial court. Also, "unless it

appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." This establishes a presumption of conflict, which presumption, in the instant case, was not overcome. It also mandates that the trial court take some action, such as appointing separate counsel, when that presumption is not overcome. This, too, was not done in the instant case.

This issue in the instant case was expressly left open by Holloway v. Arkansas, 98 S.Ct. 1173, 1178 (1978). The Court now has an opportunity to resolve this unanswered question.

CONCLUSION

The Court should grant Petitioner's Petition for Rehearing in order to issue a Writ of Certiorari to consider the increasingly vital issue presented by this case.

Respectfully submitted,

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APPENDIX A

Rule 44. Right to and Assignment of Counsel

* * *

(c) JOINT REPRESENTATION. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

ADVISORY COMMITTEE NOTE

Rule 44(c) establishes a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel. Although "[t]he Circuits are divided on whether the trial judge has a duty to inquire into conflicts or whether that responsibility may properly be left with defense counsel," United States v. Lawriw, --- F.2d --- (8th Cir. 1977) (collecting the authorities), this amendment is generally consistent with the current state of the law in several circuits. As held in United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976):

> When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views.

See also United States v. Lawriw, supra (duty on trial judge to make inquiry where joint representation by appointed or retained counsel, and "without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained by this Court");

Abraham v. United States, 549 F.2d 236 (2d Cir. 1977); United States v. Mari, 526 F.2d 117 (2d Cir. 1975); United States v. Truglio, 493 F.2d 574 (4th Cir. 1974) (joint representation should cause trial judge "to inquire whether the defenses to be presented in any way conflict"); United States v. DeBerry, 487 F.2d 488 (2d Cir. 1973); United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) (noting there "is much to be said for the rule . . . which assumes prejudice and nonwaiver if there has been no on-the-record inquiry by the court as to the hazards to defendants from joint representation"); United States v. Alberti, 470 F.2d 878 (2d Cir. 1973); United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (lack of sufficient inquiry shifts the burden of proof on the question of prejudice to the government); Campbell v. United States, 352 F.2d 359 (D.C.Cir. 1965) (where joint representation, court "has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it"). Some states have taken a like position; see, e.g., State v. Olsen, --- Minn. ---, 258 N.W.2d 898 (1977).

This procedure is also consistent with that recommended in the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972), which provide in § 3.4(b):

> Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

Avoiding a conflict-of-interest situation is in the first instance a responsibility of the attorney. If a lawyer represents "multiple clients having potentially differing interests, he must weigh carefully the possibility that

his judgment may be impaired or his loyalty divided if he accepts or continues the employment," and he is to "resolve all doubts against the propriety of the representation." Code of Professional Responsibility, Ethical Consideration 5-15. See also ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971), concluding that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

It by no means follows that the inquiry provided for by rule 44(c) is unnecessary. For one thing, even the most diligent attorney may be unaware of facts giving rise to a potential conflict. Often "counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial" and consequently "are frequently unable to foresee developments which may require changes in strategy." United States v. Carrigan, supra (concurring opinion). "Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver." United States v. Lawriw, supra.

Moreover, it is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by continued joint representation, even when an actual conflict is not then apparent. As noted in United States v. Mari, supra (concurring opinion):

> Trial court insistence that, except in extraordinary circumstances, codefendants retain separate counsel will in the long

> run . . . prove salutary not only to the administration of justice and the appearance of justice but the cost of justice; habeas corpus petitions, petitions for new trials, appeals and occasionally retrials . . . can be avoided. Issues as to whether there is an actual conflict of interest, whether the conflict has resulted in prejudice, whether there has been a waiver, whether the waiver is intelligent and knowledgeable, for example, can all be avoided. Where a conflict that first did not appear subsequently arises in or before trial, . . . continuances or mistrials can be saved. Essentially by the time a case . . . gets to the appellate level the harm to the appearance of justice has already been done, whether or not reversal occurs; at the trial level it is a matter which is so easy to avoid.

A rule 44(c) inquiry is required whether counsel is assigned or retained. It "makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflict exist, and it is also possible that the rights of the public to the proper administration of justice may be affected adversely." United States v. Mari, supra (concurring opinion). See also United States v. Lawriw, supra. When there has been "no discussion as to possible conflict initiated by the court," it cannot be assumed that the choice of counsel by the defendants "was intelligently made with knowledge of any possible conflict." United States v. Carrigan, supra. As for assigned counsel, it is provided by statute that "the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. § 3006(A)(b). Rule 44(c) is not intended to prohibit the automatic

appointment of separate counsel in the first instance, see Ford v. United States, 379 F.2d 123 (D.C.Cir. 1967); Lollar v. United States, 376 F.2d 243 (D.C.Cir. 1967), which would obviate the necessity for an inquiry.

Under rule 44(c), an inquiry is called for when the joined defendants are represented by the same attorney and also when they are represented by attorneys "associated in the practice of law." This is consistent with Code of Professional Responsibility, Disciplinary Rule 5-105(D) (providing that if "a lawyer is required to decline employment or to withdraw from employment" because of a potential conflict, "no partner or associate of his or his firm may accept or continue such employment"); and ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971) (applicable to "a lawyer or lawyers who are associated in practice").

The rule 44(c) procedure is not limited to cases expected to go to trial. Although the more dramatic conflict situations, such as when the question arises as to whether the several defendants should take the stand, Morgan v. United States, 396 F.2d 110 (2d Cir. 1968), tend to occur in a trial context, serious conflicts may also arise when one or more of the jointly represented defendants pleads guilty.

> The problem is that even where as here both codefendants pleaded guilty there are frequently potential conflicts of interest . . . [T]he prosecutor may be inclined to accept a guilty plea from one codefendant which may harm the interests of the other. The contrast in the dispositions of the cases may have a harmful impact on the codefendant who does not initially plead guilty; he may be pressured into pleading guilty himself rather than face his codefendant's bargained-for testimony at a trial. And it will be his own counsel's recommendation to the initially

> pleading codefendant which will have contributed to this harmful impact upon him . . . [I]n a given instance it would be at least conceivable that the prosecutor would be willing to accept pleas to lesser offenses from two defendants in preference to a plea of guilty by one defendant to a greater offense.

United States v. Mari, supra (concurring opinion). To the same effect is ABA Standards Relating to the Defense Function at 213-14.

It is contemplated that under rule 44(c) the court will make appropriate inquiry of the defendants and of counsel regarding the possibility of a conflict of interest developing. Whenever it is necessary to make a more particularized inquiry into the nature of the contemplated defense, the court should "pursue the inquiry with defendants and their counsel on the record but in chambers" so as "to avoid the possibility of prejudicial disclosures to the prosecution." United States v. Foster, supra. It is important that each defendant be "fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v. Alberti, supra. The rule specifically requires that the court personally advise each defendant of his right to effective assistance of counsel, including separate representation. See United States v. Foster, supra, requiring that the court make a determination that jointly represented defendants "understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government."

Under rule 44(c), the court is to take appropriate measures to protect each defendant's right to counsel unless it appears "there is good cause to believe no conflict of interest is likely to arise" as a consequence of the continuation of such joint representation. A less demanding standard would not adequately protect the Sixth Amendment right to effective

assistance of counsel or the effective administration of criminal justice. It would not suffice, for example, to require the court to act only when a conflict of interest is then apparent, for it is not possible to "anticipate with complete accuracy the course that a criminal trial may take." Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968). This is particularly so in light of the fact that if a conflict later arises and a defendant thereafter raises a Sixth Amendment objection, a court must grant relief without indulging "in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60 (1942).

Rule 44(c) does not specify what particular measures must be taken. It is appropriate to leave this within the court's discretion, for the measures which will best protect each defendant's right to counsel may well vary from case to case. One possible course of action is for the court to obtain a knowing, intelligent and voluntary waiver of the right to separate representation. See United States v. DeBerry, supra, holding that defendants should be jointly represented only if "the court has ascertained that . . . each understands clearly the possibilities of a conflict of interest and waives any rights in connection with it." It must be emphasized that a "waiver of the right to separate represenation should not be accepted by the court unless the defendants have each been informed of the probable hazards; and the voluntary character of their waiver is apparent." ABA Standards Relating to the Function of the Trial Judge at 45. United States v. Garcia, supra, spells out in significant detail what should be done to assure an adequate waiver:

> As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to

> question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloque between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

See also Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra L.Rev. 315, 334 (1977).

Another possibility is that the court will order that the defendants be separately represented in subsequent proceedings in the case. The court need not permit the joint representation to continue merely because the defendants express a willingness to so proceed. That is,

> there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may . . . require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

United States v. Carrigan, supra (concurring opinion). See also United States v. Lawriw, supra; Abraham v. United States, supra; ABA Standards Relating to the Defense Function at 213, concluding that in some circumstances "even full disclosure and consent of the client may not be a adequate protection." As noted in United States v. Dolan, --- F.2d --- (3d Cir. 1978), such an order may be necessary where the trial judge is

> not satisfied that the waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

As concluded in Dolan, "exercise of the court's supervisory powers by disqualifying an attorney representing multiple criminal defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate

defendant's sixth amendment rights". It does not follow from the absolute right of self-representation recognized in Faretta v. California, 422 U.S. 806 (1975), that there is an absolute right to counsel of one's own choice. Thus,

> when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation.

United States v. Dolan, supra. See also Geer, Conflict of Interest and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. --- (1977); Note, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977).

The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant. However, as is currently the case, a reviewing court is more likely to assume a conflict resulted from the joint representation when no inquiry or an inadequate inquiry was conducted. United States v. Carrigan, supra; United States v.

DeBerry, supra. On the other hand, the mere fact that a rule 44(c) inquiry was conducted in the early stages of the case does not relieve the court of all responsibility in this regard thereafter. The obligation placed upon the court by rule 44(c) is a continuing one, and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest.

APPENDIX B

State of Minnesota)
County of Hennepin)

Affidavit and Certification of Counsel

Marc G. Kurzman, being first duly sworn, hereby deposes and says:

He is the attorney for Petitioner in the instant case.

The within Petition for Rehearing is presented in good faith on the grounds discussed and is not for purposes of delay.

Marc G. Kurzman

Subscribed and sworn
before me this 11th
day of May, 1978.

_____
Notary Public